

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

*Orig. of David
Mansfield*

77-1247

To be argued by
DOUGLAS K. MANSFIELD

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-1247

UNITED STATES OF AMERICA,

—against—

CARLOS RIVERA,

Appellee,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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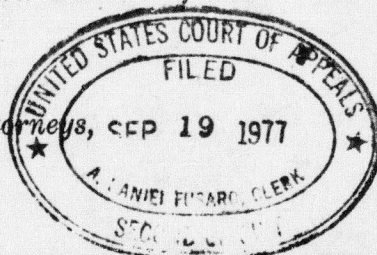


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BRIEF FOR THE APPELLEE

Preliminary Statement

Carlos Rivera appeals from a judgment of conviction entered in the United States District Court for the Eastern District of New York on May 13, 1977, after a jury trial before the Honorable Jack B. Weinstein. In that trial appellant was found guilty on each of three counts of an indictment charging him with possession of heroin with intent to distribute, distribution of heroin, and conspiracy to distribute heroin, in violation of 21 U.S.C. § 841(a)(1), 18 U.S.C. § 2 and 21 U.S.C. § 846. Appellant was sentenced to concurrent prison terms of five years plus special parole terms of five years.¹ He is free on bail pending appeal.

¹ Appellant's co-defendant Louis Acevedo was convicted on five counts, including the three on which appellant was convicted. Acevedo was sentenced to seven years imprisonment.

On appeal, appellant contends only that the evidence adduced at trial was insufficient to permit the jury to convict appellant on any of the three counts. Appellant contends here that he was "merely present" at the heroin sale on November 15, 1976 and that there was no proof of affirmative participation on his part in the illegal venture.

Statement of Facts

On November 15, 1976, Louis Acevedo, accompanied by appellant, sold approximately 76.5 grams of heroin to Special Agent Dwight Rabb of the Drug Enforcement Administration ("DEA"), who was then acting in an undercover capacity (Tr. 25-31).² At trial, the Government proved the following facts relating to appellant's participation in the sale.³

Through an informant, Agent Rabb had negotiated to purchase approximately four ounces of heroin on November 15, 1976 (Tr. 23). At about noon on November 15th, Rabb, accompanied by the informant and several DEA Agents performing surveillance duty, drove to the vicinity of 610 Ocean View Avenue, Brooklyn, New York, the residence of Acevedo (Tr. 24). Once there, Rabb sent the informant to Acevedo's house to see if the heroin was ready (Tr. 24). At about 1:00 P.M. a car containing two Hispanic males pulled into the driveway (Tr. 55), and shortly thereafter the informant returned to Agent Rabb's car with a sample of heroin and a message from Acevedo that the heroin was ready (Tr. 39).

² Numbers in parenthesis preceded by "Tr." refer to pages of the trial transcript.

³ Evidence was also adduced relating to a separate sale of heroin by Louis Acevedo to Agent Rabb on September 23, 1976.

In the car the informant also relayed Acevedo's instruction that Rabb send the \$6800 purchase money into Acevedo's house in care of the informant (Tr. 39). Rabb said, however, that he would not comply with this condition, and he instructed the informant to tell Acevedo that the sale of the narcotics would have to take place in the street outside the house (Tr. 39). At this point Agent Rabb drove his car onto Ocean View Avenue and double-parked about four or five houses past Acevedo's house (Tr. 24). The informant then walked to 610 Ocean View Avenue and met with Acevedo in front of Acevedo's house, after which Acevedo walked back up his driveway (Tr. 24). Soon thereafter the informant, Acevedo, and appellant Rivera were seen standing near the sidewalk at 610 Ocean View Avenue talking among themselves (Tr. 57). At that time, and in fact during all of the ensuing events, appellant had one of his hands thrust inside the front flap of his navy peacoat (Tr. 57).

After concluding their conversation by Acevedo's driveway, the three men walked down the street to Agent Rabb's car (Tr. 25). When they got to the car Acevedo introduced Rivera to Agent Rabb, saying, "This is my man Carlos." To Agent Rabb, who is required as part of his employment to be familiar with street language among drug dealers, Acevedo's statement indicated that Rivera was "either the owner of the heroin or he was there to protect the heroin . . . (Tr. 15, 25).⁴ Appellant did not comment but simply continued staring at Agent Rabb with his hand still inside his peacoat (Tr. 25, 58).

The heroin transaction was then effected. Agent Rabb got in the driver's side of the car while Acevedo squatted inside the open door on the passenger's side

⁴ In connection with the previous sale of heroin to Agent Rabb, Acevedo had said he would have to call "his man" to get the heroin Agent Rabb wanted (Tr. 35).

(Tr. 25, 59). Appellant stood directly behind Acevedo, leaning into the vehicle, with one hand still inside the propped-open flap of his peacoat (Tr. 25, 59). As appellant continued to stare at Agent Rabb, Acevedo pulled a brown paper bag from his pocket and handed it to Rabb (Tr. 25). From the bag Rabb extracted three clear plastic bags containing brown rock-type powder (Tr. 26). When Rabb commented that there were only three bags, instead of the four ounces he had agreed to buy, Acevedo replied "That's all I could get." (Tr. 26). Rabb then put the heroin under the driver's seat, at which point Acevedo asked, "Where is the money?" Rabb responded, "The money is in the trunk." (Tr. 26). Appellant, who during the entire exchange had been leaning over Acevedo, staring at Rabb, and keeping his hand under his coat, backed up while Acevedo stood up and closed the car door. At this point Rabb drew his revolver, pointed it at appellant (significantly) across the top of the car, and made the arrest while other agents rushed in to assist (Tr. 27).

ARGUMENT

The Evidence Was Sufficient To Support Appellant's Conviction.

Appellant makes no argument here that the evidence was insufficient to prove that a sale of heroin was made by Louis Acevedo, that appellant was present at that sale, and that appellant knew that a heroin sale was taking place. He argues simply that the evidence shows only his presence during the commission of the crime and not his participation in it.

The Government does not argue here, nor did it below, that a person's mere presence at the scene of a crime, even with knowledge that a crime is being com-

mitted, makes him guilty of aiding and abetting the principal. The law is well established that

the defendant must be shown to have knowingly associated with and participated in the criminal venture in a manner designed to accomplish its goal. *United States v. Mariani*, 539 F.2d 915, 919 (2d Cir. 1976).

See also, *United States v. Johnson*, 513 F.2d 819, 823 (2d Cir. 1975); *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). Moreover, Judge Weinstein in his charge made clear that "mere presence" was insufficient to support a conviction. Judge Weinstein instructed the jury:

In order for the defendant to be guilty of aiding and abetting, it is necessary that there may be more than mere presence and acquiescence in the crime itself. There must exist some affirmative participation which at least encourages the perpetrator. If you find that the defendant Rivera intended by his presence either to encourage Mr. Acevedo or to act as a guard in the transaction, then the requirement of participation is satisfied. (Tr. 104-105).

Appellant did not object to the court's charge nor should he have. The charge accurately stated both the rule with respect to "mere presence" and its converse: knowing participation in a crime, regardless of how limited that participation may be, makes one guilty as an aider and abettor. In *United States v. Garguilo*, 310 F.2d 249, 253 (2d Cir. 1962), this Court said:

There may even be instances where the mere presence of a defendant at the scene of a crime he knows is being committed will permit a jury to be convinced beyond a reasonable doubt that the defendant sought "by his action to make it suc-

ceed"—for example, the attendance of a 250-pound bruiser at a shakedown as a companion to the extortionist, or the maintenance at the scene of crime of someone useful as a lookout. Here presence in the car on August 11 might be thought to have been for the latter purpose. Again, it is enough if the presence of the alleged aider and abettor has stimulated others to help the perpetrator . . . or perhaps simply on the sole basis that it is proved to have positively encouraged the perpetrator himself (citations omitted).

In *United States v. Mariani*, 539 F.2d 915 (2d Cir. 1976) this Court upheld a conviction where the defendant drove the principal defendant to a bank in a stolen taxicab, drove past the bank once, and then double-parked with the engine running while the principal entered the bank. After a couple of minutes and before the principal exited the bank, the defendant sped off, used evasive tactics, and abandoned the stolen taxi. This Court held that "Mariani's actions during the surveillance period could support an inference by the jury that he was to be the getaway driver for the robbery." 539 F.2d at 920. See also, *United States v. Pui Kan Lam*, 483 F.2d 1202 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974).

The question presented here, therefore, is whether applying these standards and viewing the evidence in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60 (1942), the jury had a sufficient basis to find that the appellant aided and abetted in Acevedo's sale of heroin and that he intended by his presence both to encourage Acevedo and to act as a guard for the heroin. Stated in alternative form, appellant is asking this Court to find error in Judge Weinstein's denial of appellant's motion for a judgment of acquittal. In denying appellant's motion Judge Weinstein said (Tr. 70):

The testimony as well as the demonstration given by two of the witnesses indicating the nature of the apparent protection given by Rivera to Acevedo would permit the jury to find that Rivera participated in the transaction. The fact that he arrived at the scene and participated in the transaction, if they find that he did so, clearly supports an inference that they had agreed for him to work in concert; that would support the conspiracy count.

There were numerous pieces of evidence from which the jury could infer that appellant was a participant, rather than onlooker, in the Acevedo heroin sale. First of all, there had to be a second participant in the sale, since the heroin was not ready at Acevedo's house upon the informant's arrival.⁵ Shortly after the arrival of the two Hispanic males at Acevedo's house the informant told Agent Rabb that the deal was ready. Soon thereafter, appellant was seen taking part in a three-way conversation with the informant and Acevedo in front of Acevedo's house. From the fact of appellant's arrival at Acevedo's house in the early afternoon contemporaneously with the apparent arrival of the heroin the jury could fairly conclude that appellant's purpose in coming to Acevedo's was perhaps because he was the source of the heroin but certainly because he was participating in the transaction.

Also part of the pattern of circumstances was the fact that appellant was not seen on the street until after the informant relayed the message to Acevedo that Agent Rabb would only permit the transaction to take place in the street and not in Acevedo's house. At that time Acevedo returned to his house and moments later was

⁵ Nor had Acevedo kept the heroin in his house prior to his earlier heroin sale (Tr. 17-18).

seen out front with appellant. From these facts the jury could infer that Acevedo had sought reinforcements because of the changed plans.

The jury could also infer appellant's participation from the fact that he walked down the street and allowed himself to be introduced as Acevedo's "man Carlos." More important was the manner in which appellant behaved while these events were taking place. The undercover agent and the surveillance agent testified that from the time appellant left the front of Acevedo's house to the time he reached Agent Rabb's car about five houses down the street, appellant had the flap of his peacoat propped open and his hand stuck inside. He kept his one hand concealed while Acevedo spoke to Rabb outside the car and while he himself leaned over the squatting Acevedo during the actual delivery. All the while appellant was intently watching Agent Rabb.

Although these facts are more than sufficient for the jury to find that appellant intended to act as a guard for the heroin, they were bolstered by the demonstrations as to how appellant acted given from the stand by both agents. Conceivably this Court could imagine innocent conduct which might fit the above facts. Little room for possible innocence was left, however, after the agents demonstrated both the menacing bearing struck by appellant and the manner in which he leaned over Acevedo to monitor the heroin transaction.⁶ Just as Judge Weinstein found the witnesses' demonstrations probative in rejecting appellant's motion for a judgment of acquittal, so too presumably did the jury in reaching its guilty verdict.

⁶ This posture was aptly compared by the government attorney on summation to the position of an umpire behind a catcher (Tr. 85).

Finally, although the Government claims that various pieces of evidence by themselves supported the jury's inference that appellant actively participated in the heroin sale on November 15, 1976, these pieces of evidence taken as a whole unquestionably permitted the jury to find guilt beyond a reasonable doubt.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
September 14, 1977

Respectfully submitted,

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DOLORES M. BYRD

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BRIEF FOR APPELLEE

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GEORGE SHEINBERG, ESQ., 66 COURT STREET, BROOKLYN, NEW YORK

ponent further says that he sealed the said envelope and placed the same in the mail chute
or mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County
gs, City of New York.

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h day of September 19 77

Barbara A. Allen
BARBARA A. ALLEN
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No. 24-4646824
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mission Expires March 30, 1979